

REMARKS

This paper is submitted in response to the Office Action mailed on November 28, 2007. Claims 1, 31, 32 and 34 have been amended and claims 7 and 33 have been cancelled. Claims 1-6, 31, 32, and 34-37 now remain in the application. In view of the foregoing amendments, as well as the following remarks, Applicant respectfully submits that this application is in complete condition for allowance and requests reconsideration of the application in this regard.

Claims 1 and 3-5, of which claim 1 is independent, stand rejected under 35 U.S.C. § 102(e) as being anticipated by U.S. Patent No. 6,746,450 to Wall et al. ("Wall"). In the Office Action, the Examiner asserts:

Wall et al. disclose a monolithic spinal fixation device comprising a spinal stabilization member (body 22), and a first and second anchoring members (14) that extend from the stabilization member (14) and also extend perpendicularly from the stabilization member and are parallel to each other. See also Figure 6. The device and anchoring members form a monolithic device that is capable of insertion in to the vertebrae to aid in spinal fixation.

(Office Action, pg. 2). Applicant respectfully disagrees. More particularly, Applicant submits that Wall fails to teach or suggest that the device disclosed therein is monolithic, as is specifically recited in claim 1. Applicant's representative has reviewed the Wall disclosure and can find no explicit teaching or suggestion that the spinal correction device is a monolithic structure. Moreover, Applicant's representative can find no disclosure of any problems or other issues that would suggest that Wall even realized or understood the benefits or advantages provided by such a monolithic construction. Contrast this to the present invention. The claim clearly recites the monolithic structure of the device. Moreover, the specification makes it clear that it is

desirable to obviate the need for fasteners between the anchoring members and the stabilization member. Accordingly, Applicant respectfully submits that Wall fails to teach or suggest a monolithic device as recited in claim 1 and the claim is allowable.

Nevertheless, to advance prosecution of this case, Applicant has amended independent claim 1 to more clearly define the invention over Wall. In particular, the subject matter of claims 7 and 33 has been included in independent claim 1. Applicant notes that neither claim 7 nor 33 was rejected under this section (i.e., § 102(e)). Accordingly, Applicant respectfully submits that the amendment overcomes this rejection and the claim is allowable.

Moreover, as claims 3-5 depend from independent claim 1, and further as each of these claims recites a combination of elements not taught or suggested by Wall, Applicant respectfully submits that these claims also overcome the rejection made under 35 U.S.C. § 102(e) and are therefore allowable as well.

Claim 6 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over Wall in view of U.S. Patent Publication No. 2002/0143329 to Serhan et al. ("Serhan"). Claim 6 depends from independent claim 1. As noted above, Wall fails to teach or suggest the combination of elements recited in amended independent claim 1. Moreover, Serhan fails to cure the deficiencies in Wall. More particularly, Serhan fails to teach or suggest that "at least one of said first and second anchoring members is porous and includes a generally straight lumen extending axially therethrough for promoting the ingrowth of bone," as is recited in claim 1. Accordingly, Applicant respectfully submits that claim 6 recites a combination of elements not taught or suggested in Wall, alone or in combination with Serhan, and the claim is allowable.

Claims 2, 7, 33-34 and 37 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Wall in view of U.S. Patent No. 4,743,260 to Burton ("Burton").

In the Office Action, the Examiner asserts:

Wall et al. disclose the claimed invention except for a porous device, or where pores extend axially. Burton discloses the claimed device that has pores that may be made from biocompatible materials that are porous and aid in the acceptance and incorporation of natural bone (Col. 4, lines 45-52). Additionally, the pores created may be considered to extend at least axially, and with regard to the reference, replamineform structure may create pores that would extend along an axis as well. It would have been obvious to one having ordinary skill in the art at the time the invention was made to construct the device of Wall et al. having at least a porous structure in view of Burton to better incorporate the device into the bone over time.

(Office Action, pp. 3). As noted above, the subject matter of claims 7 and 33 have been included in amended independent claim 1 and thus must be addressed for claim 1 to stand. The Office Action correctly acknowledges that Wall fails to teach or suggest that: i) "at least one of said first and second anchoring members is porous;" and ii) the porous member "includes a generally straight lumen extending axially therethrough." The Office Action asserts that these features are disclosed in Burton. While Applicant does not waive his right to address the impropriety of the rejection based on i) above, Applicant will primarily focus on the second point.

The Office Action has essentially maintained the same position in regard to the lumen extending through at least one of the anchoring members as in the previous Office Action. Just so the record is clear, Applicant's representative understands that the Office Action is asserting the principle that a porous body, by nature of its porous structure, inherently includes a "lumen"

through the body. In other words, the Office Action asserts that a collection of generally random pores in a body constitute a lumen through the body. If Applicant's representative has in any way misunderstood the Office Action's position, clarification is respectfully requested. If, on the other hand, Applicant's representative has correctly understood the Office Action's position, then Applicant again submits that such a principle is overreaching, inconsistent with the specification of the present application, and inconsistent with the understanding of one of ordinary skill in the art. For purposes of appeal, Applicant maintains that such an interpretation is improper for the reasons presented in the previous response.

However, in an attempt to cut off a costly and time consuming appeal based on the extraordinary position taken in the Office Action, Applicant has further amended independent claim 1 to avoid such an interpretation. In this regard, Applicant has amended independent claim 1 to recite that the "at least one of said first and second anchoring members ... includes a generally straight lumen." Assuming, for sake of argument, that a collection of pores of a porous body may constitute a "lumen," the collection of random pores would not yield a generally straight lumen. To the contrary, the collection of pores would, if at all, define a meandering, torturous path through the body. Accordingly, Applicant respectfully submits that amended independent claim 1 defines over Wall in view of Burton even under such a strained interpretation as put forth in the Office Action, and the claim is allowable.

Moreover, as claims 2, 34 and 37 depend from allowable independent claim 1, and further as each of these claims recites a combination of elements not taught or suggested in Wall, alone or in combination with Burton, Applicant respectfully submits that these claims are allowable as well.

Claims 35-36 and 31-32 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Wall in view of Burton. Although Applicant does not waive the right to argue the rejection of these claims on the merits, these claims depend from allowable independent claim 1 and are allowable for at least the reasons provided above.

Conclusion

In view of the foregoing response including the amendments and remarks, this application is submitted to be in complete condition for allowance and early notice to this affect is earnestly solicited. If the Examiner believes any matter requires further discussion, the Examiner is respectfully invited to telephone the undersigned attorney so that the matter may be promptly resolved.

Applicant does not believe that any fees are due in connection with this response other than that for a one-month extension. However, if such petition is due or any fees are necessary, the Commissioner may consider this to be a request for such and charge any necessary fees to deposit account 23-3000.

Respectfully submitted,

WOOD, HERRON & EVANS, L.L.P.

/Steven W. Benintendi/

Steven W. Benintendi

Reg. No. 56,297

2700 Carew Tower
441 Vine Street
Cincinnati, OH 45202
(513) 241-2324 (voice)
(513) 421-7269 (facsimile)

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